STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 25, 2007
v ELIJAH GRAY, Defendant-Appellant.	No. 264827 Wayne Circuit Court LC No. 05-004849-01

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v ANTHONY GRAY, Defendant-Appellant.	No. 264828 Wayne Circuit Court LC No. 05-001349-01

Before: Fort Hood, P.J., and Talbot and Servitto, JJ.

PER CURIAM.

In Docket No. 264827, defendant, Elijah Gray, appeals as of right his jury trial convictions for first-degree murder, MCL 750.316, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Elijah was sentenced to life imprisonment for his first-degree murder conviction, 80 to 120 months' imprisonment for his felon in possession of a firearm conviction, and two years' imprisonment for his felony-firearm conviction. Because we find no prosecutorial misconduct or ineffective assistance of counsel, we affirm.

In Docket No. 264828, defendant, Anthony Gray, appeals as of right his jury trial convictions for first-degree murder, MCL 750.316, felon in possession of a firearm, MCL 750.224f, and felony-firearm, MCL 750.227b. Anthony was sentenced, as a fourth habitual offender, MCL 769.12, to life imprisonment for his first-degree murder conviction, 80 to 120 months' imprisonment for his felon in possession of a firearm conviction, and two years' imprisonment for his felony-firearm conviction. Because we find that Anthony was not denied

the effective assistance of counsel and that no prosecutorial misconduct occurred, but do find that there was insufficient evidence to support his felon in a possession of a firearm conviction, we affirm in part and vacate in part.

Defendants' convictions arise out the shooting death of Selina Dickson. According to the evidence, Dickson was walking toward a drug house in the early morning hours when defendants pulled up near her in a vehicle. Both defendants immediately exited the vehicle and began shooting at Dickson. Dickson ran to try to avoid the gunshots, but was struck at least twice. After the shooting, defendants left the area, and Dickson made her way to the porch of the drug house, where she died.

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Elijah raises two arguments on appeal, the first being that several instances of prosecutorial misconduct during closing argument denied him his right to a fair trial. We disagree.

We review Elijah's preserved claims of prosecutorial misconduct de novo to determine whether he was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). However, only one of the prosecutor's comments was objected to. We review his remaining, unpreserved claims for plain error affecting substantial rights, and will reverse only if the "error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence." *Ackerman*, *supra*, p 448, citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Issues of prosecutorial misconduct are considered "on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of defendant's arguments." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). "A prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but she is free to argue the evidence and any reasonable inferences that may arise from the evidence." *Ackerman*, *supra*, p 450. The "propriety of a prosecutor's remarks depends on all the facts of the case." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

Elijah first challenges the prosecutor's reference to the death penalty during closing argument. Although "the consequences of a conviction may not be discussed in the jury's presence," the prosecutor's reference to the death penalty was not improper. *In re Spears*, 250 Mich App 349, 352; 645 NW2d 718 (2002). The statement was not directed at Anthony or Elijah, but rather, at Dickson and why she was killed. The prosecutor argued that the victim, Selina Dickson, in essence, received a death penalty over a drug dispute, and this statement was supported by the evidence.

The evidence showed that Dickson was walking to a "dope" house when she was shot and killed. The evidence showed that Elijah was a drug dealer, who managed a "dope" house near the "dope" house where Dickson's body was found, and that he and Dickson had a drug-related dispute. The evidence further showed that, two weeks before the shooting, Elijah threatened to "get" Dickson over some "eight ball dope." The prosecutor's statement was thus supported by the evidence, rendering Elijah's claim meritless.

Elijah further argues that the prosecutor improperly stated that Dickson was "shot down like a dog in the street." Elijah argues the comment was improper because it invoked sympathy for the victim. We disagree.

Although a prosecutor may not appeal to a juror's sympathy, a prosecutor may use emotional language during closing argument. *Ackerman*, *supra*, p 454; *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). A prosecutor is also permitted to use "hard language" when the evidence supports it. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). The evidence here showed that as soon as Elijah and Anthony exited the car, they started shooting at Dickson and that she tried to ran away from the shooting. The prosecutor compared Dickson's shooting to that of a dog. Whether the comparison is considered emotional language or "hard language, the comparison was not improper in light of the evidence presented. The challenged remarks do not meet the threshold for reversal based on unpreserved error. *Ackerman*, *supra*, p 454.

Elijah also argues that the prosecutor improperly invoked sympathy for witness Vanessa Smith and bolstered Smith's credibility when she discussed Smith's drug problem and Smith's recovery. We disagree.

"A prosecutor may not vouch for the credibility of his [or her] witnesses by implying that he [or she] has some special knowledge of their truthfulness." *Thomas*, *supra*, p 455. However, "a prosecutor may comment on his [or her] own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *Thomas*, *supra*, p 455.

During closing argument, the prosecutor stated that Smith was serving a jail sentence for the offense of solicitation and that Smith was trying to live drug free and stay clean. The prosecutor also stated that Smith testified "at a personal cost to herself" and that Smith "got beat up before the preliminary exam." The prosecutor further argued that "after being beat up [Smith] still came in and testified in court under oath." The statements were not improper. The prosecutor permissibly commented on Smith's credibility when she argued Smith's past and her drug free life. Smith was the primary witness to the shooting, but Smith acknowledged that at the time of the shooting she worked as a prostitute and that she was using drugs. The prosecutor's arguments regarding Smith's drug free life and recovery were not made not to invoke sympathy for Smith, but rather, to address the credibility to her testimony given her professed drug use and prostitution. Because a prosecutor is permitted to comment on the credibility of its witnesses, Elijah has failed to show prosecutorial misconduct. *Thomas*, *supra*, p 455.

Elijah further argues that the prosecutor improperly argued that he exited the car with "guns blazing." We disagree. The statement was not improper because the evidence supported it. The evidence showed that as soon as Elijah and Anthony exited the car, they started shooting at Dickson. The prosecutor was free to argue the evidence and any reasonable inferences that may arise from the evidence. *Ackerman*, *supra*, p 450. A prosecutor is also permitted to use "hard language" when the evidence supports it. *Ullah*, *supra*, p 678. The statement was supported the evidence, and therefore, Elijah has failed to show prosecutorial misconduct.

In any event, the court instructed the jury that the lawyers' statements and arguments were not evidence and that it should "only accept things that the lawyers say that are supported by evidence or by [its] own common sense and general knowledge." The court also instructed the jury not to "let sympathy or prejudice" influence it's decision. Even if the challenged remarks had any prejudicial potential, the trial court's instructions were sufficient to eliminate any prejudice that may have stemmed from the prosecutor's statement. *People v Daniel*, 207 Mich App 47, 57; 523 NW2d 830 (1994).

Elijah's argument that the cumulative errors deprived him of a fair trial is without merit. "Because no errors were found with regard to any of the above issues, a cumulative effect of errors is incapable of being found." *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Elijah next argues that he was denied the effective assistance of counsel because counsel made no attempt to locate several witnesses. We disagree.

Generally, whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002); *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). However, defendant did not move for a new trial or an evidentiary hearing on this basis below. Failure to so move forecloses appellate review unless the record contains sufficient detail to support his claims, and, if so, review is limited to the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). To prevail on a claim for ineffective assistance of counsel, a defendant must make two showings. First, the defendant must show that counsel's performance was so deficient that, under an objective standard of reasonableness, the defendant was denied his Sixth Amendment right to counsel. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Second, the defendant must show that the deficient performance prejudiced the defense. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Carbin*, *supra* at 599-600. Thus, the defendant must overcome a strong presumption that defense counsel's action constituted sound trial strategy. *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994).

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). "The decision whether to call witnesses is a matter of trial strategy which can constitute ineffective assistance of counsel only when the failure to do so deprives the defendant of a substantial defense." *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526-527; 465 NW2d 569 (1990).

Elijah argues that his defense counsel was ineffective because he failed to call Leonard Young, Joshua Harris and a man known as "Alexis" as witnesses when they were all present at the "dope" house when Dickson was killed. Elijah also argues that because Young and Harris appeared to have had contact with Dickson's dead body, and Smith claimed she spoke to Alexis when she went to the house after the murder, these people should have been called to testify. Elijah speculates that, had these witnesses testified, they may have disputed Smith's testimony regarding the events of that night.

Although Elijah argues that counsel was ineffective for failing to call Harris, Young and Alexis as witnesses, Elijah failed to show by an affidavit or offer of proof what these witnesses would have testified to, and he failed to show that there is a reasonable probability that the testimony would have altered the outcome of the trial. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). Smith identified Elijah as one of the men who shot Dickson the night she was killed. According to Smith, Elijah and Anthony exited the car and they immediately began shooting at Dickson. Because Elijah fails to show how Young, Harris and/or Alexis would have created reasonable doubt regarding his involvement in the murder if they testified, he has failed to show that his counsel's failure to call these witnesses denied him a substantial defense. *Hoyt*, *supra*, pp 537-538. Elijah's ineffective assistance of counsel claim thus fails.

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On appeal, Anthony Gray first argues that he, too, was denied the effective assistance of counsel. Anthony agues that he was denied the effective assistance of counsel because his counsel failed to request a due diligence hearing to determine why the prosecution failed to produce Young and Harris as witnesses. We disagree.

A prosecutor has a continuing duty "to advise the defense of all res gestae witnesses that the prosecutor intends to produce at trial. Put in other terms, the prosecutor's duty to produce res gestae witnesses was replaced with the duty to provide notice of known witnesses and to give reasonable assistance in the locating of witnesses if a defendant requests such assistance." *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). Defense counsel requested that the prosecution produce Young and Harris as witnesses, or that the prosecution assist him in producing these witnesses. The prosecution informed counsel that Young and Harris were two "dope" dealers who ran a "dope" house and that their whereabouts were unknown. The prosecution further informed defense counsel that they tried to locate these witnesses through the means of an investigator but the men were no longer at the "dope" house. The prosecutor then maintained that she would comply with the court order and have the police conduct a diligent search to see if Young and Harris were in the county jail. The prosecution's investigator, Officer James Fisher, testified at trial and he maintained that he looked for Young and Harris "all over the place" and that he also had individuals in the neighborhood looking for them. Officer Fisher said he was informed that Harris had another "dope" house in the neighborhood and he went there to search for him, but the house had been burned.

Anthony has failed to show that his counsel's failure to request a due diligence hearing denied him the effective assistance of counsel. A due diligence hearing would have been futile because the prosecutor already placed on the record that she tried to locate Young and Harris but her efforts were unsuccessful. "The test [of due diligence] is one of reasonableness and depends

on the facts and circumstances of each case, i.e., whether diligent good faith efforts were made to procure the testimony, and not whether more stringent efforts would have produced it." *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998).

It appears from the record that the prosecutor diligently tried to locate Young and Harris to present them at trial, but Young and Harris could not be located. In light of Officer Fisher's testimony and the prosecutor's statements on the record, defense counsel most likely concluded that the prosecutor's efforts to locate and produce Young and Harris constituted due diligence, and that a hearing would be futile. Counsel is not obligated to make futile requests. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002). Therefore, defense counsel was not ineffective for failing to move for a due diligence hearing.

Anthony also argues that he was denied the effective assistance of counsel because his counsel failed to request a missing witness instruction. We disagree.

A missing witness instruction may be appropriate when the prosecution does not show due diligence in locating a missing witness. *People v Perez*, 469 Mich 415, 420; 670 NW2d 655 (2003). In this event, "it might be appropriate to instruct a jury that the missing witness would have been unfavorable to the prosecution." *Perez, supra*, p 420. Because it appears that the prosecution used due diligence in trying to locate Young and Harris, a missing witness instruction was unwarranted. Anthony's ineffective assistance of counsel claim based on a missing witness instruction is without merit.

Anthony next argues that he is entitled to a new trial because the prosecutor improperly argued facts that were not in evidence and defense counsel failed to object to the improper argument. We disagree.

We review Anthony's unpreserved prosecutorial misconduct claim for plain error. *Ackerman*, *supra*, p 448. Because Anthony did not move for a new trial or an evidentiary hearing with respect to his ineffective assistance of counsel claim, our review is limited to the record. *Barclay*, *supra*, p 672.

The prosecutor argued throughout closing that drugs lead to Dickson's death. Specifically, the prosecutor argued that the possession of drugs and the selling of drugs were the underlying motive behind Dickson's death. The prosecutor further argued that Dickson was killed over the allegation that she stole "rocks of cocaine." Even without the prosecutor's comments, however, the jury could have reached this conclusion on its own. Evidence was presented which showed that Elijah was a drug dealer and Dickson was a drug user. The evidence also showed that, two weeks before the shooting, Elijah threatened to "get" Dickson over some "eight ball dope." It was reasonable for the jury to conclude that the dispute between Elijah, a drug dealer, and Dickson, a drug user, was more than likely over stolen drugs or over the non-payment of drugs.

The above being true, Anthony's ineffective assistance of counsel claim based upon a failure to object to the prosecutor's statements is meritless. Even if counsel's failure to object to the statement fell below an objective standard of reasonableness, Anthony has failed to show that the outcome of the case would have been different but for counsel's error. The evidence clearly showed that Elijah was a drug dealer and Dickson a drug user and that two weeks before the

shooting Elijah threatened to "get" Dickson over drugs. Smith identified Elijah and Anthony as the persons directly responsible for Dickson's death. The statement regarding the stolen drugs was introduced to establish the motive behind the killing, but even if the statement was never placed before the jury the outcome would remain the same because direct evidence was presented connecting Anthony to Dickson's murder.

Furthermore, the court instructed the jury that the lawyers' statements and arguments were not evidence and that it should "only accept things that the lawyers say that are supported by evidence or by [its] own common sense and general knowledge." Thus, even if the challenged remarks had any prejudicial potential, the trial court's instructions were sufficient to eliminate any prejudice that may have stemmed from the prosecutor's statement. *Daniel*, *supra*, p 57.

Lastly, Anthony argues that the prosecution presented insufficient evidence to support his felon in a possession of a firearm conviction. We agree. We review an insufficiency of the evidence claim in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003), citing *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

Generally, to prove the offense of being a felon in possession of a firearm the prosecution must show that the defendant possessed a firearm when ineligible to do so because of a prior felony conviction. MCL 750.224f; *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). Under MCL 750.224f, felons are placed in two different categories: (1) persons convicted of a felony, in which "these persons regain their right to possess a firearm three years after paying all fines imposed for their violations, serving all jail time imposed, and successfully completing all conditions of parole or probation," and (2) persons convicted of a specified felony, in which these "persons must wait five years after completing the same requirements and, moreover, must have their right to possess a firearm restored." *People v Perkins*, 473 Mich 626, 630-631;703 NW2d 448 (2005).

Anthony was charged and convicted under MCL 750.224f, for being a person convicted of a specified felony who was ineligible to posses a firearm. However, we are unable to locate in the record any evidence of or stipulation to Anthony's prior felony conviction and his ineligibility to possess a firearm. On appeal, the prosecution fails to cite to where in the record a stipulation was entered and fails to cite to any evidence to support defendant's conviction. Because we are unable to conclude that any evidence of defendant's ineligibility to possess of a fireman was presented to the jury, the prosecution presented insufficient evidence and defendant's conviction is vacated. *Green*, *supra*, p 691.

Affirmed in part and vacated in part.

/s/ Karen M. Fort Hood
/s/ Michael J. Talbot
/s/ Deborah A. Servitto